

Hobbs Act Extortion and Robbery (*18 U.S.C. § 1951*)

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6.18.1951 Hobbs Act - Elements of the Offense (18 U.S.C. § 1951)

In order to sustain its burden of proof for the crime of interfering with interstate commerce by *(robbery)(extortion)* as charged in Count *(No.)* of the indictment, the government must prove the following three (3) essential elements beyond a reasonable doubt:

First: That Defendant *(name)* took from *(the victim alleged in the indictment)* the property described in Count *(No.)* of the indictment;

Second: That *(name)* did so knowingly and willfully by *(robbery)(extortion)*; and

Third: That as a result of *(name)*'s actions, interstate commerce *(an item moving in interstate commerce)* was obstructed, delayed, or affected.

Comment

Kevin F. O'Malley, Jay E. Grenig, & Hon. William C. Lee, 1A Federal Jury Practice and Instructions § 53.03 [hereinafter O'Malley et al., *supra*].

18 U.S.C. § 1951(a) provides:

Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

If the defendant is charged with attempt the court should adapt this instruction and should also give Instruction 7.01 (Attempt).

Likewise, if the defendant is charged with conspiracy to violate this statute, the appropriate instructions on conspiracy should be given. *See* Instruction 6.18.371A et seq.

It should be noted that a Hobbs Act conspiracy does not require proof of an overt act. *See Ladner v. United States*, 168 F.2d 771, 773 (5th Cir. 1948); *United States v. Facciolo*, 753 F. Supp. 449 (S.D.N.Y. 1990). The Third Circuit has not addressed this question, but has held that drug conspiracies and RICO conspiracies do not require proof of an overt act. *See* Comment to Instruction 6.18.1962D (discussing RICO conspiracies) and Instruction 6.21.846B (discussing drug conspiracies).

In *United States v. Traitz*, 871 F.2d 368, 380-81 (3d Cir. 1989), the trial court gave the following instruction:

In order to meet its burden of proving that the defendants committed extortion under the Hobbs Act, the Government must prove each of the following elements:

First, that the defendants induced or attempted to induce others to part with their property;

Second, that the defendants did so with the victims' consent, but that this consent was compelled by the wrongful use or threat of force, violence or fear;

Third, that interstate commerce or an item moving in interstate commerce was delayed, obstructed or affected in any way or degree; and

Fourth, that the defendants acted knowingly and willfully.

The Third Circuit quoted the instructions but remarked only that the defendants did not challenge the trial court's "general recitation of the essential elements of the Hobbs Act." *Traitz*, 871 F.2d at 381. *See also United States v. Driggs*, 823 F.2d 52 (3d Cir. 1987). In *Driggs*, the court noted:

The essential elements that the government must prove are that the defendant obstructed, delayed or affected commerce or attempted to do so; by extortion ("the obtaining of property from another, with his consent, . . . under color of official right"); and that the defendant acted knowingly and willfully.

823 F.2d at 54.

6.18.1951-1 Hobbs Act - Robbery Defined

Robbery is the unlawful taking or obtaining of personal property from the person or in the presence of another, against *(his)(her)* will, by means of actual or threatened force, or violence, or fear of injury, whether immediately or in the future, to *(his)(her)* person or property, or property in *(his)(her)* custody or possession, or the person or property of a relative or member of *(his)(her)* family or of anyone in *(his)(her)* company at the time of the taking or obtaining.

Comment

O'Malley et al., supra, § 53-05.

18 U.S.C. § 1951(b)(1) provides:

As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

6.18.1951-2 Hobbs Act - Extortion by Force, Violence, or Fear

Extortion is the obtaining of another person's property or money, with (his)(her) consent when this consent is induced or brought about through the use of actual or threatened force, violence or fear.

[In order for (name) to have obtained the property of another there must have been a transfer of possession of, or a legal interest in, that property from that other person to (name) or a designee of (name).]

Comment

Hon. Leonard Sand, John S. Siffert, Walter P. Loughlin, Steven A. Reiss & Nancy Batterman, *Modern Federal Jury Instructions - Criminal Volumes 50-9* (Matthew Bender 2003) [hereinafter, Sand et al., *supra*]; O'Malley et al., *supra*, § 53.09.

18 U.S.C. § 1951(b)(2) provides:

As used in this section—

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

The court should use this instruction when the defendant is charged with extortion through force, violence, or fear. The court should also give Instructions 6.18.1951-3 (Hobbs Act - "Unlawful Taking by Force, Violence or Fear" Defined), 6.18.1951-4 (Hobbs Act - "Fear of Injury" Defined), and 6.18.1951-5 (Hobbs Act - Property Defined). If the defendant is charged with extortion under color of official right, the court should give Instruction 6.18.1951-6 (Hobbs Act - Extortion Under Color of Official Right).

The bracketed language should be included if there is a question concerning whether the defendant acquired property rather than simply depriving the victim of property. Mere deprivation of property or interference with the use of property is not sufficient under the statute. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court addressed the definition of "extortion" under § 1951. The Court stated, "we have construed the extortion provision of the Hobbs Act at issue in these cases to require not only the deprivation of but also the acquisition of property." *Id.* at 404.

6.18.1951-3 Hobbs Act - “Unlawful Taking by Force, Violence or Fear”

Defined

The government must prove beyond a reasonable doubt that *(name)* unlawfully took *(the alleged victim)*’s property against *(his)(her)* will by actual or threatened force, violence, or fear of injury, whether immediately or in the future. You must determine whether *(name)* obtained the property by using any of these unlawful means, as set forth in the indictment. The government does not need to prove that force, violence, and fear were all used or threatened. The government satisfies its burden of proving an unlawful taking if you unanimously agree that *(name)* employed any of these methods; that is, the government satisfies its burden only if you all agree concerning the particular method used by *(name)*.

In considering whether *(name)* used, or threatened to use force, violence or fear, you should give those words their common and ordinary meaning, and understand them as you normally would. A threat may be made verbally or by physical gesture. Whether a statement or physical gesture by *(name)* actually was a threat depends upon the surrounding facts.

Comment

Sand et al., *supra*, 50-5.

If the defendant is charged with attempt the court should modify this instruction accordingly. *See United States v. Parkin*, 319 F. App’x. 101 (3d Cir. 2009) (non-precedential) (holding that where defendant was charged with attempted extortion, the government did not need to establish that the defendant actually caused fear). (revised 12/09)

6.18.1951-4 Hobbs Act - “Fear of Injury” Defined

Fear exists if a victim experiences anxiety, concern, or worry over expected personal (*physical*)(*economic*) harm. The fear must be reasonable under the circumstances existing at the time of the defendant’s actions.

Your decision whether (*name*) used or threatened fear of injury involves a decision about (*the alleged victim*)’s state of mind at the time of (*name*)’s actions. It is obviously impossible to prove directly a person’s subjective feeling. You cannot look into a person’s mind to see what (*his*)(*her*) state of mind is or was. But a careful consideration of the circumstances and evidence should enable you to decide whether (*the alleged victim*) was in fear and whether this fear was reasonable.

Looking at the overall situation and the actions of the person in question may help you determine what (*his*)(*her*) state of mind was. You can consider this kind of evidence – which is called “circumstantial evidence” – in deciding whether (*name*) obtained property through the use of threat or fear.

You have also heard the testimony of (*the alleged victim*) describing (*his*)(*her*) state of mind – that is, how (*he*)(*she*) felt about giving up the property. This testimony was allowed to help you decide whether the property was obtained by fear. You should consider this testimony for that purpose only.

You may also consider the relationship between (*name*) and (*the alleged*

victim) in deciding whether the element of fear exists. However, even a friendly relationship between the parties does not preclude you from finding that fear exists.

Comment

Sand et al., *supra*, 50-6. See also *United States v. Provenzano*, 334 F.2d 678, 687 (3d Cir. 1964) (citing *United States v. Tolub*, 309 F.2d 286 (2d Cir. 1962) (fear experienced by the victim must be reasonable)); *United States v. Addonizio*, 451 F.2d 49, 72 (3d Cir. 1972) (fear may be of economic or physical harm).

6.18.1951-5 Hobbs Act - Property Defined

The term “property” includes money and other tangible and intangible things of value.

Comment

Sand et al., *supra*, 50-4.

In many cases, there will be no need to instruct the jury on the meaning of the term “property.” When intangible property is involved, the court should include this instruction. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 402 (2003), the Supreme Court recognized that the term property includes intangible as well as tangible things of value.

6.18.1951-6 Hobbs Act - Extortion Under Color of Official Right

The government alleges that *(name)* committed extortion under color of official right. A public *(official)(employee)* commits "extortion under color of official right" if *(he)(she)* uses the power and authority of *(his)(her)* office in order to obtain money, property, or something of value from another to which neither that public *(official)(employee)* nor that government office has an official right.

Extortion under color of official right means that a public official induced, obtained, accepted, or agreed to accept a payment to which he or she was not entitled, knowing that the payment was made in return for taking, withholding, or influencing official acts. *[The government may show that the benefit was meant to be given to the public official directly, or to a third party who is not a public official but who was acting in concert with the public official.]*

The government is not required to prove an explicit promise to perform the official acts in return for the payment. Passive acceptance of a benefit by a public official is a sufficient basis for this type of extortion, if the official knows that *(he)(she)* is being offered payment in exchange for *(his)(her)* ability to do official acts.

The government is not required to prove that *(name)* made any specific threat or used force or fear to cause *(the victim alleged in the indictment)* to part with the property that the indictment alleges *(name)* obtained by extortion

under color of right. However, the government must prove beyond a reasonable doubt that (name) knowingly and deliberately used (his)(her) official position in order to obtain something of value, to which (name) had no right.

[The government is not required to prove that (name) actually possessed the official power to guarantee, deny, or influence any actions. It is enough to show that (victim alleged in indictment) reasonably believed that (name) had the actual, residual, or anticipated official power to help (him)(her) with respect to matters pending before a government agency.]

[In order for (name) to have obtained the property of another there must have been a transfer of possession of, or a legal interest in, that property from that other person to (name) or a designee of (name).]

Comment

Sand et al., supra, 50-9; O'Malley et al., supra, § 53.09.

18 U.S.C. § 1951(b)(2) provides:

As used in this section—

* * *

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

This instruction and the one that follows address extortion by color of official right, which is distinct from extortion through force, violence, or fear, and may only be committed by a public official (although a non-public official may be guilty of aiding and abetting extortion by color of official right).

In *United States v. Kenny*, 462 F.2d 1205, 1229 (3d Cir. 1972), the Third Circuit held that the following instruction properly defined extortion under the statute:

The term 'extortion' means the obtaining of property from another with his

consent induced either by wrongful use of fear or under color of official right. The term 'fear', as used in the statute, has the commonly accepted meaning. It is a state of anxious concern, alarm, apprehension of anticipated harm to a business or of a threatened loss.

* * *

Extortion under color of official right is the wrongful taking by a public officer of money not due him or his office, whether or not the taking was accomplished by force, threats or use of fear. You will note that extortion as defined by Federal Law is committed when property is obtained by consent of the victim by wrongful use of fear, or when it is obtained under color of official right, and in either instance the offense of extortion is committed.

The defendant complained that the instruction defined extortion disjunctively, allowing the jury to find extortion if the defendant obtained money or property either by use of fear or under color of official right. The Third Circuit rejected the defendant's argument and explained:

[W]hile private persons may violate the statute only by use of fear and public officials may violate the act by use of fear, persons holding public office may also violate the statute by a wrongful taking under color of official right. The term "extortion" is defined in § 1951(b)(2): "The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." The "under color of official right" language plainly is disjunctive. That part of the definition repeats the common law definition of extortion, a crime which could only be committed by a public official, and which did not require proof of threat, fear, or duress. The disjunctive charge on § 1951 extortion was correct.

Id. at 1229 (citations omitted). In *United States v. Urban*, 404 F.3d 754, 768 (3d Cir. 2005), the Third Circuit explained that, "[i]n order to prove Hobbs Act extortion 'under color of official right,' 'the Government need only show that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts.'"

The government may show that the benefit was meant to be given to the public official directly, or to a third party who is not a public official but who was acting in concert with the public official. *See generally United States v. Antico*, 275 F.3d 245, 255-56 (3d Cir. 2001); *United States v. Bradley*, 173 F.3d 225, 231-32 (3d Cir. 1999); *United States v. Margiotta*, 688 F.2d 108, 133 (2d Cir. 1982) ("A Hobbs Act prosecution may lie where the extorted payments are transferred to third parties, including political allies and political parties, rather than to the public official who has acted under color of official right.").

The offense of extortion under color of official right does not have to involve force or threat on the part of the public official. The coercive element is provided by the existence of the public office itself. *Evans v. United States*, 504 U.S. 255, 265 (1992); *Antico*, 275 F.3d at 255 n.14; *United States v. Jannotti*, 673 F.2d 578, 594 (3d Cir. 1982).

An explicit promise to perform the official acts in return for the payment is not required. *Evans*, 504 U.S. at 268; *Antico*, 275 F.3d at 255-56; *Bradley*, 173 F.3d at 231. Passive acceptance of a benefit by a public official is a sufficient basis for this type of extortion, if the official knows that he or she is being offered payment in exchange for his ability to do official acts. The government need not prove that the public official first suggested or solicited the giving of money or property. *Evans*, 504 U.S. at 259; *United States v. Blandford*, 33 F.3d 685, 698-99 n.15 (6th Cir. 1994). Extortion occurs if the official knows that the payment or benefit is motivated by a hope that it will influence the official in the exercise of his or her office, or influence any action that the official takes because of the official position, and if, knowing this, the official accepts or agrees to accept the payment or benefit or have it accepted by another person. *United States v. Holzer*, 816 F.2d 304, 311 (7th Cir. 1987); *United States v. Butler*, 618 F.2d 411, 417-19 (6th Cir. 1980); *United States v. Trotta*, 525 F.2d 1096, 1101 (2d Cir. 1975) ("To repeat, it is the use of the power of public office itself to procure the payments of money not owed to the public official or his office that constitutes the offense."); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974).

It is not necessary for the government to prove that the defendant actually misused or attempted to misuse the power of his/her office insofar as the defendant granted some benefit or favor to the payors. Though the payors may not have gotten any more than their due in the defendant's performance of his office, the defendant's acceptance of money or a benefit, in return for the use of, or the attempted use of, his/her office is extortion. See *Antico*, 275 F.3d at 255-58; *United States v. Evans*, 30 F.3d 1015, 1019 (8th Cir. 1994); *United States v. Loftus*, 992 F.2d 793, 797 (8th Cir. 1993); *Holzer*, 816 F.2d at 308; *United States v. Paschall*, 772 F.2d 68, 71, 74 (4th Cir. 1985) (citing *United States v. Manton*, 107 F.2d 834 (2d Cir. 1939)); *United States v. Bibby*, 752 F.2d 1116, 1128 (6th Cir. 1985) ("[I]t is not essential that a [public] official be able to guarantee a certain result before his acceptance of money to bring about that result will run afoul of the law."); *United States v. Butler*, 618 F.2d 411, 420 (6th Cir. 1980).

The public official's agreement to take or refrain from taking an action on behalf of the payor need not be express. *Antico*, 275 F.3d at 255-57.

The official need not actually possess the power to provide or deny the particular action. *United States v. Mazzei*, 521 F.2d 639, 645 (3d Cir. 1975); *United States v. Nedza*, 880 F.2d 896, 902 (7th Cir. 1989); *United States v. Braasch*, 505 F.2d 139, 151 (7th Cir. 1974). It is the payor's reasonable belief in such power which is relevant. *Mazzei*, 521 F.2d at 643; *United States v. McDonough*, 56 F.3d 381, 388 (2d Cir. 1995); *Nedza*, 880 F.2d at 902; see *United States v. Brown*, 540 F.2d 364, 372 (8th Cir. 1976); *United States v. Freedman*, 562 F. Supp. 1378, 1385 (N.D. Ill. 1983).

The bracketed language in the last paragraph should be included if there is a question concerning whether the defendant acquired property rather than simply depriving the victim of property. Mere deprivation of property or interference with the use of property is not sufficient under the statute. In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), the Court addressed the definition of “extortion” under § 1951. The Court stated, “we have construed the extortion provision of the Hobbs Act at issue in these cases to require not only the deprivation of but also the acquisition of property.” *Id.* at 404.

6.18.1951-7 Hobbs Act - Affecting Interstate Commerce

The third element that the government must prove beyond a reasonable doubt is that *(name)*'s conduct affected or could have affected interstate commerce. Conduct affects interstate commerce if it in any way interferes with, changes, or alters the movement or transportation or flow of goods, merchandise, money, or other property in commerce between or among the states. The effect can be minimal.

It is not necessary to prove that *(name)* intended to obstruct, delay or interfere with interstate commerce or that the purpose of the alleged crime was to affect interstate commerce. Further, you do not have to decide whether the effect on interstate commerce was to be harmful or beneficial to a particular business or to commerce in general. You do not even have to find that there was an actual effect on commerce. All that is necessary to prove this element is that the natural consequences of the offense potentially caused an effect on interstate commerce to any degree, however minimal or slight.

Comment

Sand et al., *supra*, 50-7 and 50-15.

18 U.S.C. § 1951(b) provides:

As used in this section--

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and

any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

In *United States v. Haywood*, 363 F.3d 200, 209-10 (3d Cir. 2004), the Third Circuit addressed the interstate commerce element:

To sustain a conviction for interference with commerce by robbery under § 1951, the government must prove the element of interference with interstate or foreign commerce by robbery. "The charge that interstate commerce is affected is critical since the Federal Government's jurisdiction of this crime rests only on that interference." However, "[i]f the defendants' conduct produces any interference with or effect upon interstate commerce, whether slight, subtle or even potential, it is sufficient to uphold a prosecution under [§ 1951]." Moreover, "[a] jury may infer that interstate commerce was affected to some minimal degree from a showing that the business assets were depleted." (citations omitted).

The court held that the following instruction was proper:

if the government proves beyond a reasonable doubt that this business purchased goods or services that came from outside St. Thomas, Virgin Islands, and that, therefore, all or part of the personal property obtained from this business, because of the alleged robbery, came from outside St. Thomas, Virgin Islands, then you are instructed that you may find that the defendants obtained, delayed or affected commerce as this term is used in these instructions.

The court held further that the government satisfied its burden on this element by introducing the testimony of a police officer that the victim business sold some beers that were not manufactured in the Virgin Islands, but came instead from the mainland United States. *Haywood*, 363 F.3d at 210. *See also United States v. Clausen*, 328 F.3d 708, 710-11 (3d Cir.2003) (stating that effect on commerce may be minimal).

In *United States v. Urban*, 404 F.3d 754, 762 (3d Cir. 2005), the Third Circuit held that the following instruction properly conveyed the way in which the government could establish effect on commerce through a depletion of assets theory:

You do not even have to find that there was an actual effect on commerce. All that is necessary to prove this element is that the natural consequences of the extortion--of the money payment, potentially caused an effect on interstate commerce to any degree, however minimal or slight. Payment from a business engaged in interstate commerce satisfies the requirement of an effect on interstate commerce. If the resources of a business are expended or diminished as a result of the payment of money, then interstate commerce

is affected by such payment and may reduce the assets available for purchase of goods, services or other things originating in other states.